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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1423

JOSEPH VICTOR CUSUMANO and
SIDNEY M. HARMON,
Petitioners,

vs.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

SIDNEY M. HARMON
Vida, Missouri 65581
JOSEPH VICTOR CUSUMANO
Rt. 1, Box 43 F
Portage des Sioux, Missouri 63373
Petitioners in Pro Se

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

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JOSEPH VICTOR CUSUMANO and
SIDNEY M. HARMON,
Petitioners,

vs.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Joseph Victor Cusumano and Sidney M. Harmon respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on December 17, 1974.

OPINIONS OF THE COURTS BELOW

The Judgments and Memorandum Opinions of the United States District Court for the Eastern District of Missouri, Eastern Division, are reported at 373 Federal Supplement 1128 and are printed here at Pages A 1, A 3 and Pages A 28, A 31.

The Opinion of the Eighth Circuit Court of Appeals is found at 507 Federal Reporter 2d 980 and printed here in the Appendix at Pages A 11-A 24, and the Judgment of that Court is found in the Appendix at Page A 9.

JURISDICTION

The Judgment of the Eighth Circuit Court of Appeals was entered on December 17, 1974, and is printed in the Appendix at Pages A 9-A 24. The Order denying a Rehearing was issued on January 24, 1975, and is printed in the Appendix herein at Page A 25. The Order denying the motion to vacate the order denying rehearing and to reinstate Petition for Rehearing was issued on February 12, 1975, and is printed at Page A 26. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the Judgment of the Trial Court dismissing petitioners' case because the pleading of the petitioners established that the petitioners had a right, secured by the Federal Constitution and laws, to a statement of the reasons for their termination and a hearing on those charges.

2. Whether the Court of Appeals erred in affirming the judgment of the Trial Court because petitioners having been reappointed after their maximum probationary period had a Constitutionally protected expectancy to continued employment giving respondent the discretion to terminate only for good and sufficient cause.

3. Whether the Court of Appeals erred in distinguishing the case of *Perry v. Sindermann*, 408 U.S. 593 (1972), and in not bringing its decision in harmony with decisions from other Circuits.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and regulations,

1. Fourteenth Amendment to the United States Constitution:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

2. 42 U.S.C., Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceedings for redress."

3. Acadamic Tenure Regulations, University of Missouri, as Established March 10, 1950, by the Board of Curators (hereinafter referred to as the Regulations). The complete text of the Regulations is given in Appendix H at page A 34, the provisions directly involved are the following:

Sec. 2. Types of appointments.

A. There shall be two types of appointments to academic staff positions, term appointments and continuous appointments.

B. Term appointments begin at a specified date and terminate at a specified date. Term appointments usually are for a period of one academic year, but may be for a longer or shorter period.

C. Continuous appointments begin at a specified date but have no specified date of termination.

D. Appointments to regular academic staff positions may be either term appointments or continuous appointments, subject to the limitation stated in Sections 4 and 5 as to the maximum number of years of service under term appointments.

Sec. 3. Tenure.

A. Holders of academic staff positions under continuous appointments shall have permanent or continuous tenure, subject to termination only for cause, for retirement for age in accordance with Board retirement regulations, or under extraordinary circumstances because of financial exigencies. Due consideration shall be given to seniority in terms of academic rank and length of service in the event certain continuous appointments must be terminated because of financial exigencies.

STATEMENT OF THE CASE

This suit was brought in the United States District Court for the Eastern District of Missouri, Eastern Division, by petitioners Cusumano and Harmon against the respondents, who were administrative officers and members of the Board of Curators of the University of Missouri. Jurisdiction was based on the Fourteenth Amendment to the United States Constitution and on Title 28 U.S.C., Sections 1331, 1343 and 2201 and Title 42 U.S.C. Section 1983.

The University of Missouri by its Board of Curators established Academic Tenure Regulations (hereinafter called "Regulations") on March 10, 1950, which govern its contractual relationship with academic staff members. These Regulations are appended hereafter as Appendix H. at Page A 34. These Regulations remained in full force and effect and were a part of the contract under which petitioners worked for the University of Missouri until they were terminated. The respondents adopted a Statement of Principles concerning academic freedom and tenure and attached said statement to the academic tenure regulations referred to hereinabove. This Statement of Principles was promulgated and endorsed by the Association of American Colleges, the Association of University Professors and various other academic associations (A 54).

The maximum probationary period for petitioner Harmon, because of his appointment and his prior experience was 3 years of employment. Petitioner Cusumano's appointment called for a 7 year maximum probationary period. During the period of their employment petitioners each received one year term appointments; Harmon's third such appointment and Cusumano's seventh appointment were given to them in the spring of 1970 for the school year 1970-1971.

During the school year 1970-1971, Harmon in late December of 1970, Cusumano in late March, 1971, the petitioners

were notified by the respondents that they were going to be given a one year term appointment for the following year and at the end of that appointment they would be terminated. They were given no reason whatever for the termination. To their inquiry concerning the reason for their termination the petitioners were told that no reasons were necessary since they had no tenure under the existing Regulations. Petitioner Harmon had many years of teaching and research experience at the university level prior to accepting appointment at the University of Missouri. Petitioner Cusumano had been voted the outstanding teacher in his department four times during the seven years of his employment. They were told of no inadequacy in their performance. (Petitioners' First Amended Complaint Count I, para. 14, 15, 16, 17, 25; Count II, para. 12, 19.)

Petitioners fruitlessly sought the cause of their termination through the administrative channels of the University and then brought a complaint to the Eastern District of Missouri, U.S. District Court against the respondents. This complaint was dismissed on the fourth day of October, 1972, and the Memorandum and Order of Dismissal is appended hereto as Appendix F. The dismissal was predicated on the promise of the University that an administrative hearing would be held, making the petitioners' complaint premature. A hearing was held thereafter but it was not a substantive hearing as to the cause of termination but a hearing to determine whether or not the petitioners had been given timely notice of termination. And it was decided that they had.

The petitioners alleged that the policy and practice of the University had been to give a continuous appointment contract or "tenure" to all teachers at the end of the maximum probationary period and this allegation has remained unchallenged by the respondents. (Count I, paragraph 19 and Count II, paragraph 15 of First Amended Complaint.)

The petitioners were each given one year appointments beyond their maximum probationary period and were told that they would not be rehired thereafter.

Neither of the petitioners has been able to secure employment in an academic institution since their termination from the University of Missouri.

All of the above facts are undisputed and uncontradicted by Respondents' Motion to Dismiss which was granted.

REASONS FOR GRANTING THE WRIT

The question squarely presented in this writ is: When University professors have completed their maximum probationary period as set forth in the Regulations of the University, by whom they are employed, can they be terminated without being given the reasons for their termination and a hearing on the charges?

In the opinion of the Eighth Circuit Court of Appeals the only way that a teacher can acquire a protectable interest in his job in a State or public university which has rules and regulations for tenure is to have acquired "tenure" (or to have received a contract of continuous appointment) (A 22). Such an interpretation gives the University a right to breach any of its rules concerning the length of teacher probation with impunity. This interpretation flies in the face of this Courts' pronouncements in *Perry v. Sindermann*, 408 U. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The contract between the respondents and petitioners embodies the rules and regulations adopted by the respondents (Appendix H) and the petitioners had a right to rely on its provisions. Petitioners have been unable to find a fact situation similar to their own but the principles which govern their relationship with respondent have been discussed in numerous opinions. The theoretical underpinnings of this relationship have been set forth in the Supreme Court decisions *Perry v. Sindermann*, supra, and *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Other Circuits have recognized that there must be a balancing of competing interests in any decision concerning the State's interest as employer versus the individual's interest. (Pred v. Board of Public Instruction of Dade County, Fla., 415 F. 2d 851 (5th Cir. 1969), *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970), Cert. Denied, 402 U. S. 972).

The crucial issue which petitioners pray this Court to review is when a state university adopts principles of academic freedom

and tenure promulgated by many educational organizations and uses these principles as an inducement to teachers to accept employment at its institution, can it ignore those principles in its dealings with its employees (Appendix H)? As with most universities which adopted the Principles of Academic Freedom and Tenure under pressure from the various educational associations endorsing the principles, the University of Missouri formed its Regulations from the Principles. They recognize only two types of appointments, term appointments before the expiration of the probationary period, and continuous appointments for tenure after the expiration of such period (4 and A 36). After the end of the probationary period, termination must be for just and sufficient cause.

The Court of Appeals has stated that the "Statement of Principles" adopted by the respondents are only guidelines which can be varied at the pleasure of the university (A 23). The Statement of Principles states:

> **Academic Tenure**
>
> (a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

and further:

> (a)(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of high education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a proba-

> tionary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notices should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.

The university adopts the length of probation and the notice principle in the body of the Regulations (A 34).

Any teacher appointed to the regular academic staff of the University of Missouri had an absolute right to rely on the fact if he were not notified to the contrary at least one year prior to the end of his maximum probationary period as set forth, he would be continued in service under a continuous employment contract.

Both petitioners reached the penultimate year of their maximum probationary periods in the school year 1969-1970. Both finished their teaching duties and began preparing for the following year without notice that they would not be retained with a continuous employment contract. Having fulfilled their contractual obligations to that date, they had a right to rely on the respondents to fulfill their contractual obligations and that right amounts to a property right: the expectancy of re-employment that is fully explained in the *Roth* and *Sindermann* cases, supra. The advantages to the University and the detriments to the teacher of ignoring this principle are crystal clear. The University of course would prefer never to commit itself to a long term contract but would prefer to reexamine each teacher each year. The detriment to the teacher is obvious in this case. The notice which petitioners received in the winter and spring of the 1970-1971 school year was so late as to prohibit them from finding alternative teaching employment during the 1970-1971 school year. Petitioners were forced then to accept the offer from the University of Missouri at Rolla. The University thus, in actuality,

received two years service from veteran teachers on a temporary appointment basis, without granting the rightful tenure benefits to teachers of such experience. The loss of the summer and fall of 1970 to seek new employment caused incalculable damage to the petitioners, since neither of the petitioners were able to secure employment after beginning their search in the winter and spring of 1971.

It is undisputed that in the past, the practice of the university was to give a contract for continuous employment at the end of a teacher's probationary period (Petitioners' First Amended Complaint. Count I paragraph 15 and Count II paragraph 19). Added to this practice the Statement of Principles adopted in the body of the University Regulations, it is clearly shown that the petitioners have more than a "mere expectancy of employment" that this court eschewed in *Roth*, supra.

District Court Judge Samuel P. King stated petitioners' position eloquently in *Stephen M. Francis v. Charles S. Ota et al.*, 356 F. Supp 1029 (DCD. Hawaii 1973) at page 1033:

> In the developing area of the law dealing with academic due process, it is clear that a non-tenured faculty member must have more than a subjective expectation of future employment in order to assert a property interest protected by the Fourteenth Amendment. Board of Regents v. Roth, *supra*. However, even where a contract obligation might not otherwise exist, the college can create one if it adopts regulations or standards which lead to the expectation of re-employment. Greene v. Howard University, 134 U.S.App. D.C. 81, 412 F. 2d 1128 (1969); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). The Supreme Court amlified this principle in *Roth, supra*: "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitle-

ment to those benefits." 408 U.S. 577, 92 S.Ct. 2709. In Perry v. Sindermann, *supra*, decided the same day *Roth*, the Court quoted with approval from Corbin on Contracts to the effect that "[e]xplicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' " It held that the teacher "must be given an opportunity to prove the legitimacy of his claim of such entitlement [to continued employment] in light of 'the policies and practices of the institution.' "

The petitioners have presented a bona fide constitutional claim upon which there has been no hearing in the lower courts. In a parallel situation this court held, in *Perry v. Sindermann*, supra, that the grant of Summary Judgment against the complainants, without full exploration of the issue, was improper. Mr. Justice Stewart wrote in *Perry v. Sindermann*, supra at page 602,

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts —that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 579, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. See Byse & Joughin, Tenure in American Higher Education 17-28.

The Eighth Circuit Court of Appeals has refused to recognize the principle of contractual obligations between the university and the non-tenured teacher discussed in the First Circuit in *Green v. Howard University*, supra and *Francis v. Ota*, supra. The objective expectancy of re-employment can only be defeated by a due process method including notice of the reasons or charges against the teacher, and a hearing at which the teacher may defend his position and good name.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and order of the Court of Appeals for the Eighth Circuit.

Respectfully submitted

SIDNEY M. HARMON
Vida, Missouri 65581
Petitioner in Pro Se

JOSEPH VICTOR CUSUMANO
Route 1, Box 42 F
Portage des Sioux, Missouri 63373
Petitioner in Pro Se

Certificate of Service

Three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed this 12th day of May, 1975, postage prepaid to Messrs. Jackson A. Wright, Marvin E. Wright, James S. Newberry & Richard S. Paden, 227 University Hall, Columbia, Missouri 65201, and Mr. Robert Neill, Jr., 705 Olive Street, St. Louis, Missouri 63101.

Sidney M. Harmon

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Joseph Victor Cusumano and Sidney M. Harmon, Plaintiffs, vs. Dr. C. Brice Ratchford, Dr. A. G. Unklesbay, Dr. Merl Baker, Individually and in their official capacity as representatives of the administration of the University of Missouri; and Members of the Board of Curators of the University of Missouri: Judge William H. Billings, William S. Thompson, Jr., Howard Woods, William C. Meyers, Jr., Pleasant R. Smith, John Sam Williamson, Irvin Fane, Mrs. William C. Tucker, Van D. Williams, Individually and in their official capacities as members of the Board of Curators of the University of Missouri, Defendants.	No. 73 C 668 (1)

ORDER

A memorandum dated this day is hereby incorporated in and made a part of this order.

It Is Hereby Ordered, Adjudged, and Decreed that the First Amended Complaint be and is hereby dismissed with prejudice.

Dated this 19th doy of March, 1974.

/s/ JAMES H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Joseph Victor Cusumano and Sidney M. Harmon, Plaintiffs,

vs.

Dr. C. Brice Ratchford, Dr. A. G. Unklesbay, Dr. Merl Baker, Individually and in their official capacity as representatives of the administration of the University of Missouri; and Members of the Board of Curators of the University of Missouri: Judge William H. Billings, William S. Thompson, Jr., Howard Woods, William C. Meyers, Jr., Pleasant R. Smith, John Sam Williamson, Irvin Fane, Mrs. William C. Tucker, Van D. Williams, Individually and in their official capacities as members of the Board of Curators of the University of Missouri, Defendants.

No. 73 C 668 (1)

MEMORANDUM

This action is before this Court on the motions of the defendants to dismiss or in the alternative to sever the claims. The motions to dismiss will be granted.

The plaintiffs have alleged that defendants' actions violated their constitutional rights under the Fourteenth Amendment to

the United States Constitution. Plaintiff Cusumano was an instructor on a seven-year probationary period, during which time he was rehired each year on one-year term contracts. Plaintiff Harmon was an associate professor on a three-year probationary period, during which time he was rehired each year on a one-year term contract. The Academic Tenure Regulations of the University of Missouri (regulations) established March 10, 1950, were a part of both plaintiffs' contracts.

Plaintiffs Cusumano and Harmon received notice during their last probationary year (plaintiff Cusumano's seventh year, plaintiff Harmon's third year) that they each would be reappointed to a terminal one-year term, and not be rehired thereafter. Both plaintiffs allege a violation of their constitutional rights due to the failure of the University to give them a hearing on the reasons for this action.

The Supreme Court of the United States has recently been confronted with this issue of procedural due process in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). The Court said that all teachers do not have a right to procedural due process merely because their employment is terminated, but their rights to liberty or property must have been violated by the termination. In this case, the plaintiffs do not contend their rights to liberty were violated, and would not prevail on this issue anyway, by the Supreme Court's analysis of this right. However, both plaintiffs allege the violation of their rights to property,

> ". . . 'property' denotes a broad range of interests that are secured by 'existing rules or understandings' [Board of Regents v. Roth, supra] at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . ." *Perry v. Sindermann*, supra, at 601.

Thus, procedural due process must be observed in the case of a tenured teacher or one discharged in mid-year. There are also other times where a teacher may have a "legitimate claim of entitlement to job tenure". *Perry v. Sindermann*, supra, at 602, and procedural due process would be required.

However, in the instant case, the regulations that were a part of each plaintiffs' contract clearly state in regard to Mr. Cusumano:

> "Sec. 4. . . .
>
> A. Instructor. Initial appointment at the rank of Instructor shall be a term appointment for one academic year. The maximum probationary period on term appointments shall not exceed seven years. During the appointee's initial one year term, and during each succeeding term through his seventh year of service, his dean or other appropriate administrative officer shall make one of the following recommendations, except that recommendations (1) and (2) shall not be made during the appointee's seventh year of service:
>
> (1) that he be reappointed Instructor for a term;
>
> (2) that he be promoted to Assistant Professor on term appointment. If such recommendation is effected by Board action, Section 4 B controls thereafter, except that the maximum probationary period on term appointments shall not exceed seven years, and all of the service as an Instructor shall be credited toward said seven year period;
>
> (3) that he be promoted to Assistant Professor on continuous appointment;
>
> (4) in exceptional individual cases, that he be reappointed Instructor on continuous appointment;
>
> (5) in special types of positions under the jurisdiction of the Dean of the College of Agriculture, the Dean of the

College of Education, the Director of Experiment Stations, or the Vice-President in Charge of Extra-Divisional Educational Activities, that he be reappointed Instructor on continuous appointment;

(6) that he be reappointed Instructor for a terminal one year term, expressly stated to be such; or

(7) that he not be reappointed, provided there has been timely notice as stipulated in Section 4 E. A formal recommendation to this effect need not be made."

and in regard to Mr. Harmon:

"Sec. 4. . . .

C. Associate Professor. Initial appointment at the rank of Associate Professor normally shall be a term appointment. The maximum probationary period on term appointments shall not exceed four years. During the appointee's initial term, and during each succeeding term through his fourth year of service, his dean or other appropriate administrative officer shall make one of the following recommendations, except that recommendation (1) shall not be made during the appointee's fourth year of service:

(1) that he be reappointed Associate Professor for a term;

(2) that he be reappoined Associate Professor on continuous appointment;

(3) that he be promoted to Professor on continuous appointment;

(4) that he be reappointed Associate Professor for a terminal one year term, expressly stated to be such; or

(5) that he not be reappointed, provided there has been timely notice as stipulated in Section 4 E. A formal recommendation to this effect need not be made."

These same regulations provide for a one-year notice to each of the plaintiffs in this case, but also state at 4E:

> "A terminal one year term appointment expressly stated to be such shall be sufficient notice that the appointee will not be recommended for reappointment at the end of the terminal period."

The regulations also provide:

> "The non-reappointment of any appointee on term appointment shall carry no implication that either his work or his conduct has been unsatisfactory. For this reason it shall not be necessary for his dean or department chairman to provide him with any statement of causes or reasons for not recommending reappointment."

With such clear and explicit language in the regulations that were a part of their contracts, the plaintiffs do not have a legitimate claim of entitlement to job tenure or even a reasonable expectation of employment for more than the one-year terms they received.

B. [The plaintiffs have contended that the sentence on page 16 in the Appendix to the regulations that

> ". . . Notices should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period."

entitled them to notice prior to their final probationary year, if they were not to be given a continuous appointment following this final year. This contention cannot prevail. This sentence says notice "should" be given, not "must", and cannot be a basis for job entitlement when read with the definite provisions earlier set out. Also this notice is only provided for if the teacher is not to be "continued in service" at the

end of his probationary period. It does not say that he is to be given such notice if not to be continued in service with a continuous appointment at the end of his probationary period.] At the end of his terminal appointment even this provision is satisfied. The University's actions were completely in accord with these regulations and the plaintiffs have no property interest protectable by procedural due process under the Fourteenth Amendment to the United States Constitution. Therefore, this action will be dismissed. The other motions need not now be considered.

Dated this 19th day of March, 1974.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX B

Judgment

United States Court of Appeals
For the Eighth Circuit

No. 74-1381. September Term, 1974

Joseph Victor Cusumano and Sidney M. Harmon,
Appellants,

vs.

Dr. C. Brice Ratchford, Dr. A. G. Unklesbay, Dr. Merl Baker, Individually and in Their Official Capacity as Representatives of the Administration of the University of Missouri; and Members of the Board of Curators of the University of Missouri: Judge William Howard Woods, William C. Meyers, Jr., Pleasant R. Smith, John Sam Williamson, Irvin Fane, Mrs. William C. Tucker, Van D. Williams, Individually and in Their Official Capacities as Members of the Board of Curators of the University of Missouri,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 17, 1974

Costs taxed in favor of Appellees:
Costs of printing 10 copies of Appellees' brief: $178.50

Total costs of Appellees for recovery from Appellants in the U. S. District Court: $178.50

APPENDIX C

United States Court of Appeals
for the Eighth Circuit

No. 74-1381

Joseph Victor Cusumano and Sidney M. Harmon,
Appellants-Plaintiffs,
v.
Dr. C. Brice Ratchford, et al.,
Appellees-Defendants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 15, 1974

Filed: December 17, 1974

Before Lay and Webster, Circuit Judges, and Talbot Smith,* Senior District Judge.

Talbot Smith, Senior District Judge.

The controversy before us concerns yet another aspect of the relationships between educational institutions and their teachers.[1] Here the problem centers around the school's failure to reappoint probationary teachers and the rights of the disappointed teachers with respect thereto.

---

* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1] See compendium cited in *Frazier v. Curators of University of Missouri*, 495 F.2d 1149, 1150 n.1 (8th Cir. 1974).

The plaintiffs before us are two teachers. The defendants are administrative officers of the University of Missouri and the members of its Board of Curators (hereinafter, collectively, the University). The Complaint states that plaintiff Cusumano was employed in September of 1964, under a term appointment for one year as an instructor of engineering mechanics at the University of Missouri-Rolla, Rolla, Missouri. At or about this time he received a copy of the Academic Tenure Regulations of the University (Regulations) to which reference will hereinafter be made. He subsequently received one-year contracts on September 1st of each year through and including the school year 1970-1971. On March 31, 1971 he was notified that he would be appointed to a terminal one-year term for the school year 1971-1972 but would not be rehired thereafter.

Plaintiff Harmon was employed in September of 1968 as an associate professor of mathematics at Rolla, also receiving at such time the University's Academic Tenure Regulations. He was rehired from year to year on term appointments through and including the school year 1970-1971. In December of 1970 he was notified that his appointment for the school year 1971-1972 was a terminal appointment and that he would not be hired thereafter.

In view of the fact that both teachers were on "term appointments" as opposed to continuous or tenure appointments, neither was given reasons for his nonreappointment, the University relying upon its Regulation specifically so stating:

> [I]t shall not be necessary for his [the term appointee's] dean or department chairman to provide him with any statement of causes or reasons for not recommending reappointment.[2]

---

[2] Regulations, Section 4F.

Subsequent to the commencement of a prior related action plaintiffs were given a hearing,[3] but they assert that it was fruitless since the hearing produced no reasons for nonreappointment. Apparently plaintiffs sought to utilize this hearing as a forum to establish their academic credentials, since they complain to us that at the hearing they "could not defend against charges concerning their professional competency because they were never informed of those charges." (Competency is not the issue presented to us, however, though it is pled as a part of the inducement.)

What is presented is the claim that plaintiffs' constitutional rights to due process under the Fourteenth Amendment were violated by the University's refusal to give them reasons for their nonreappointment with an adequate hearing thereon. They seek damages, back pay, declaratory relief and an order requiring the University to reinstate them with "tenure or continuous employment."[4] Ordinarily, under the teachings of *Perry v. Sindermann*,

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[3] The plaintiffs' original lawsuit was dismissed without prejudice, the court noting in its Memorandum and Order of October 4, 1972 that:

> Although the complaint makes no reference thereto, it is not disputed that after the Tenure Committee of the University had heard and considered the respective cases of plaintiffs and submitted a majority and minority report with respect thereto, both plaintiffs appealed their non-retention to the Board of Curators (over a month before this suit was filed) and that said appeals were referred by the President of the Board to its Academic Affairs Committee. Thereafter, both plaintiffs through their attorney requested an opportunity to appear before the Committee and present oral arguments by themselves and by their counsel and such opportunity was afforded them, although for various reasons, one of which was related to the convenience of their counsel, the requested hearing has not yet been held. It is now scheduled for October 12, 1972. In this situation * * * the procedural due process claim is premature.

The hearing subsequently held was not to plaintiffs' satisfaction, and they brought this second action against the University.

[4] Plaintiffs' prayers for relief ask:

> That the Court issue a permanent injunction enjoining Defendants from refusing to honor that portion of the Regulations

408 U.S. 593 (1972) and *Board of Regents v. Roth*, 408 U.S. 564 (1972), a probationary teacher has an insufficient "property interest" in the continuation of his employment past the expiration of his contract to invoke due process protections concerning the decision not to reappoint him. In this case, however, plaintiffs assert in substance that under their contracts and in the circumstances before us they have acquired a "*de facto* tenure"[5] entitling them to such protection. The court below found otherwise and dismissed the action. We agree.

The issue presented concerns the proper interpretation of the University's Regulations which, it is conceded by both parties, are incorporated by reference in the contracts of the plaintiffs. The University of Missouri, in the year 1950, promulgated extensive and specific Academic Tenure Regulations establishing a tenure system for all academic employees of the University. Two types of appointments are specified, term appointments and

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by which Plaintiff is entitled to tenure or continuous employment.

Cf. Machlup, *In Defense of Tenure*, in *Academic Freedom & Tenure: A Handbook of the American Association of University Professors* 306, 310 (L. Joughin ed. 1967) [hereinafter cited as Machlup]:

> No self-explanatory adjective * * * is available to abbreviate the phrase "tenure until retirement or removal for adequate cause," which is the meaning of academic tenure in the United States. The adjectives actually used are "permanent," "continuous," or "indefinite."

[5] *Perry v. Sindermann*, 408 U.S. 593, 600 (1972). "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing" *Id.* at 601. "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

continuous appointments.[6] Only holders of the latter type of appointment have permanent or continuous tenure. Term appointees have no rights thereto although their appointments cannot lawfully be terminated during the term, save "for cause."[7]

Considering the plaintiffs in turn, Mr. Cusumano was, under his contract, an instructor. The regulations concerning the termination of his service are found in Regulations, Section 4A:

> *Instructor.* Initial appointment at the rank of Instructor shall be a term appointment for one academic year. The maximum probationary period on term appointments shall not exceed seven years. During the appointee's initial one

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[6] Regulations, Section 2 provides:

Types of Appointments.

A There shall be two types of appointments to academic staff positions, term appointments and continuous appointments.

B. Term appointments begin at a specified date and terminate at a specified date. Term appointments usually are for a period of one academic year, but may be for longer or shorter period.

C. Continuous appointments begin at specified date but have no specified date of termination.

* * * * * * *

[7] Regulations, Section 3 provides:

Teneure.

A. Holders of academic staff positions under continuous appointments shall have permanent or continuous tenure, subject to termination only for cause, for retirement for age in accordance with Board retirement regulations, or under extraordinary circumstances because of financial exigencies. Due consideration shall be given to seniority in terms of academic rank and length of service in the event certain continuous appointments must be terminated because of financial exigencies.

B. Holders of academic staff positions under term appointments shall have no rights of permanent or continuous tenure. Their appointments shall not be terminated during the term thereof except for cause, or under extraordinary circumstances because of financial exigencies.

* * * * * * *

year term, and during each succeeding term through his seventh year of service, his dean or other appropriate administrative officer shall make one of the following recommendations * * *:

> [(1)-(5) list retention alternatives.]
>
> (6) that he be reappointed Instructor for a terminal one year term, expressly stated to be such; or
>
> (7) that he not be reappointed, provided there has been timely notice as stipulated in Section 4E. A formal recommendation to this effect need not be made. . .

With respect to Associate Professor Harmon the pertinent termination regulations are found in Section 4C:

> *Associate Professor*. Initial appointment at the rank of Associate Professor normally shall be a term appointment. The maximum probationary period on term appointments shall not exceed four years. During the appointee's initial term, and during each succeeding term through his fourth year of service, his dean or other appropriate administrative officer shall take one of the following recommendations * * *:
>
> [(1)-(3) list retention alternatives.]
>
> (4) that he be reappointed Associate Professor for a terminal one year term, expressly stated to be such; or
>
> (5) that he not be reappointed, provided there has been timely notice as stipulated in Section 4E. A formal recommendation to this effect need not be made.

The notice provisions in event of nonreappointment are found in Section 4E of the Regulations and provide, substantially, that

notice of not less than one year shall be given to those in the categories of these plaintiffs, but that appointment for a "terminal one year term * * * expressly stated to be such" (one of the University's options "during each succeeding term") "shall be sufficient notice that the appointee will not be recommended for reappointment at the end of the terminal period."[8] As noted, such notice need not include a statement of reasons for the nonreappointment.[9]

The above Regulations as to termination of employment bear directly upon plaintiffs' basic argument, namely, that "during the period of their employment they acquired a protectable property interest in their jobs" under the teachings of *Roth* and *Sindermann, supra*. This property interest, we are told, arose from "the expectancy of reemployment that is fully explained in the *Roth* and *Sinderman* [sic] cases." In view of the

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[8] Regulations, Section 4E provides:

> *Notice that reappointment will not be recommended*. An appointee who is not to be recommended for reappointment at the end of any term of appointment shall be notified in writing to that effect by his dean or other appropriate administrative officer. Notice of not less than one year shall be given to the following persons: (1) an Instructor who has completed at least three years of service; (2) an Assistant Professor who has completed at least two years of service; and (3) an Associate Professor or Professor who has completed his initial term appointment. In all other cases notice of not less than six months shall be given, i.e., in the usual case of a term appointment for the regular academic year, the notice shall be given prior to March 1.
>
> A terminal one year term appointment expressly stated to be such shall be sufficient notice that the appointee will not be recommended for reappointment at the end of the terminal period.
>
> * * * * * * *

[9] Regulations, Section 4F provides:

> *Statement of reasons for not recommending reappointment*. The non-reappointment of any appointee on term appointment shall carry no implication that either his work or his conduct has been unsatisfactory. For this reason it shall not be necessary for his dean or department chairman to provide him with any statement of causes or reasons for not recommending reappointment. [Footnote omitted.]

fact that the Regulations above quoted (Section 4A(6), 4C(4) and 4E) clearly state that during any year of a term appointee's probationary period[10] he may be subject to what amounts to a notification of discharge by appointment to a terminal one year term, and that such notifications actually were given to the plaintiffs on, respectively, December 22, 1970 (Harmon) and March 31, 1971 (Cusumano) specifying a terminal academic year ending over a year hence, we are unable to find any reasonable expectancy of reemployment under the teachings of *Roth* and *Sindermann*. The entire thrust of the tenure Regulations is to avoid the *de facto* tenure hypothesized in *Sindermann*, *supra*, 408 U.S. at 602, amounting to "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." Peculiarly applicable to the *de facto* tenure doctrine is Section 3B of the Regulations which states that "Holders of academic staff positions under term appontments shall have no rights of permanent or continuous tenure."

But plaintiffs would avoid the provisions of the Regulations above cited by reliance upon Section 2 of the *1940 Statement of Principles* adopted by the University and attached as an appendix to the Regulations. This *1940 Statement of Principles*, we note at this point, has as its stated purpose "to promote public understanding and support of academic freedom and tenure and agreement upon procedure to assure them in colleges and universities." It origins, and the "status" of the principles enunciated are described by Machlup[11] thus:

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[10] The school year 1970-71 was for each plaintiff the last year of his probationary period. Regulations, Sections 4A and 4C. It was Mr. Cusumano's seventh year as an instructor and Mr. Harmon's third year as an associate professor. Under Section 5C of the Regulations, one year of Mr. Harmon's prior service was credited towards his four year maximum probationary period.

[11] Machlup, *supra* note 4, at 307 n.4.

> There was first the 1915 *Declaration of Principles*, formulated by a committee of the AAUP.[a] This was superseded by the 1925 *Conference Statement*, approved by both the AAC[b] and the AAUP. Subsequently, after prolonged discussions over a period of six years begun in 1934, the two organizations agreed on the 1940 *Statement of Principles*, which is still "on the books" and has been endorsed by 24 [42 in 1967] professional and learned societies. The principles enunciated in the 1940 *Statement* have the status of "norms," not merely guidelines—although, of course, they are not norms that could be enforced against those who do not observe them, but merely norms by which the profession can judge academic practices which have become the subject of complaints. [Footnotes added.]

The above-mentioned Section 2, relied upon by plaintiffs, states in part that "Notices should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period."[12] Plaintiffs would read "should" in the quoted sen-

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[a] American Association of University Professors.

[b] Association of American Colleges.

[12] The context of this quotation from the *1940 Statement of Principles* is as follows:

> *Academic Tenure*
>
> (a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.
>
> In the interpretation of this principle it is understood that the following represents acceptable academic practice.
>
> (1) The precise terms and conditions of every appointment should be stated in writing and be in the possession

tence as "must" and conclude therefrom that since notices were not given (as they "must" have been) during "the penultimate year of their maximum probationary periods in the School year 1969-1970" they had "a property right: the expectancy of re-employment that is fully explained in the *Roth* and *Sinderman* [sic] cases."

Our problem, of course, is to determine the effect to be given the language of the *Statement of Principles*, precatory on its fact, when the *Statement* has been adopted as part of a teacher's contract. The *Statement of Principles*, it is clear, was not intended by its promulgators to be a binding legal document. The procedures of the disputed Section 2 are stated to represent "acceptable," not obligatory, "academic practice." The "precise terms and conditions of every appointment," it states, should be reduced to writing—words of admonition contemplating transition from the generalities of the *Principles* to the precision of a contract. The function of the *Principles*, it has been said, is to serve as "merely norms by which the profession can judge academic practices which have become the subject of complaints."[13]

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of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of high education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. *Notices should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.* [Emphasis added.]

[13] Machlup, *supra* note 4, at 307 n.4: "The principles could [not] be enforced against those who do not observe them, but [are] merely norms by which the profession can judge academic practices which have become the subject of complaints."

The notification provision itself has as a principal and desirable purpose that of an economic shield: according a probationary teacher reasonable warning of impending cessation of employment with its attendant professional and financial dislocations and adjustments.[14] We find no vulnerability of the University on this score. The plaintiffs, in each instance, received over a year's warning prior to their separation from the payroll.

But another consideration, as well, forces itself upon us. In addition to the types of tenure now existing, characterized by

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[14] Such considerations are stressed in AAUP, *Advisory Letter Number One*, 48 AAUP Bull. 394 (1962), in *Academic Freedom & Tenure: A Handbook of the American Association of University Professors* 121-3 (L. Joughin ed. 1967) which states in part as follows:

The Year's Notice Rule—Its History. Of the several rules which protect the teacher in his sought for or achieved tenure status, one of the most important is the provision that he shall receive a year's notice if he is not being reappointed (applicable to nontenure status teachers), or if he is dismissed (tenure status teachers). The need for such a rule has been seen from the beginning of the American Association of University Professors in 1915 to the present moment * * *.

The first major policy statement by this Association, the 1915 Declaration of Principles, stated that "No university teacher of any rank should, except in cases of grave moral delinquency, receive notice of dismissal or of refusal of reappointment later than three months before the close of any academic year, and in the case of teachers above the grade of instructor, one year's notice should be given." Ten years later there emerged from a conference called the American Council on Education a statement which was endorsed by the Association of American Colleges and by this Association. The 1925 Conference Statement eliminated the consideration of rank and tied the notice principle to tenure. It said: "Dismissal for reasons other than immorality or treason should not ordinarily take effect in less than a year from the time the decision is reached." Fifteen years later, the 1940 Statement of Principles, likewise endorsed by the Association of American Colleges and this Association, extended the right to a year's notice to all. It said: "Notice should be given at least one year prior to the expiration of the probationary period if the teacher is

one writer in the field[15] as "tenure by law," "tenure by contract," "tenure by moral commitment under a widely accepted academic code" and "tenure by courtesy, kindness, timidity or inertia;" we are asked to sanction another: tenure by default. This is clear from the arguments advanced by plaintiffs in support of their position, namely, that such "continuous employment" arises from the University's alleged failure to comply with the "mandatory" terms of the *1940 Statement of Principles*. They argue that any teacher has "an absolute right to rely on the fact that if he were not notified to the contrary at least one year prior to the end of his maximum probationary period as set forth, he would be continued in service under a continuous employment contract." This, in fact, is the basis for plaintiffs prayer for injunctive relief, that due to a lack of notice in the 1969-70 school year they are "entitled to tenure or continuous employment."

We find nothing in the *1940 Statement of Principles* warranting a conclusion so drastic. It cannot serve the public welfare

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not to be continued in service after the expiration of that period. . . . Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification whether or not they are continued in their duties at the institution." (Since the one-year provision places the burden of an unrealistic procedure upon an institution at the beginning of its acquaintance with a teacher, Committee A of the Association in its 1957 Recommended Institutional Regulations authorized the Washington Office to relax the requirement to this extent: during the first year of a teacher's service, notice is adequate if given by March 1; during the second year of service, notice should be given six months before the end of the academic year.)

The Year's Notice Rule in Practice.

* * * * * * * *

* * * [N]o one can object to a year's notice for a professional man who has been busy doing his work and has had no time to arrange for next year.

[15] *Machlup, supra* note 4, at 311.

or promote the best interests of either the University or its professorial staff to have a body of teachers, whatever their number, the permanent tenure of whom rest upon administrative neglect or oversight as to notice on termination.

Section 2 of the *Statement of Principles*, we conclude, is not mandatory, it is not inconsistent with the University's Regulations, and furnishes no support for plaintiffs' assertions of *de facto* tenure.[16]

It seems appropriate to express a caveat: We do not, obviously, hesitate to enter the burgeoning school-teacher fray when constitutional issues are at stake. So much should be abundantly clear from the compendium cited in note 1, *supra*. But aside from such issues, the matters of the selection of teachers, their professional qualifications, and their retention are best (and, as a matter of law, properly) left to those entrusted by the state with the awesome responsibilities for the education of our young.[17]

We find that the probationary teachers before us had acquired no tenure, *de facto* or otherwise, in the circumstances presented, and that they had no constitutional or contractual rights to a statement of reasons for nonreappointment or a hear-

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[16] We will note, merely for completion of analysis, that it is far from clear that the clause was violated, even if mandatory. The Section 2 notice in the *Statement of Principles* applies only if the teacher is not to be "continued in service" at the end of his probationary period. Here there was an actual continuation in service under a term appointment ("begin at a specified date and terminate at a specified date," Regulations, Section 2B), albeit the appointment was terminal.

[17] *See Greene v. Howard University*, 271 F. Supp. 609, 615 (D. D.C. 1967), *rev'd in part*, 134 U.S. App. D.C. 81, 412 F.2d 1128 (1969), quoted in *Frazier v. Curators of University of Missouri*, 495 F.2d 1149, 1153 (8th Cir. 1974); *Jones v. Hopper*, 410 F.2d 1323, 1329 (10th Cir. 1969).

ing thereon. *Frazier v. Curators of University of Missouri*, 495 F.2d 1149 (8th Cir. 1974).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

United States Court of Appeals for the Eighth Circuit

No. 74-1381 September Term, 1974

Joseph Victor Cusumano, et al., Appellants,
vs.
Dr. C. Brice Ratchford, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition ror rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 24, 1975

APPENDIX E

United States Court of Appeals for the Eighth Circuit

74-1381 September Term, 1974

Joseph Victor Cusumano and Sidney M. Harmon, Appellants,

vs.

Dr. C. Brice Ratchford, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

This appeal from the United States District Court for the Eastern District of Missouri comes before us on consideration of a motion to vacate the court's previous order denying petition for rehearing and to reinstate the petition for rehearing.

The court's judgment was entered in this case on December 17, 1974. An extention of time was granted for the filing of petition for rehearing and the said petition was filed January 14, 1975. Suggestion for rehearing en banc was filed January 15, 1975. Pursuant to rule 35(b) of the Federal Rules of Appellate Procedure the suggestion for rehearing en banc was transmitted by the clerk of this court to the judges in regular active service together with a copy of the petition for rehearing. There was no request for a vote on the suggestion for rehearing en banc by an active judge of the court and, on January 24, 1975, an order was entered denying the petition for rehearing en banc and the petition for rehearing. That order was entered at the direction of the hearing panel of the court.

The motion to vacate the order denying rehearing and to reinstate the petition for rehearing is denied. To eliminate any

possible confusion in this case the hearing panel of the court hereby reiterates its denial of petition for rehearing previously made on January 24.

February 12, 1975

APPENDIX F

In the United States District Court
Eastern District of Missouri
Eastern Division

Joseph Victor Cusumano and Sidney M. Harmon,
Plaintiffs,
vs.
C. Brice Ratchford, et al.,
Defendants.
No. 72 C 388 (2)

Memorandum and Order

Before us are motions of various defendants to dismiss or alternatively to sever claims and drop parties.

Plaintiffs have alleged that each of them was a teacher at the University of Missouri until his respective employment was wrongfully terminated. Although their claims are individual and personal to themselves they have joined in a single action to vindicate their separate alleged rights to tenure.

The basic issue presented by the motions to dismiss is whether we have jurisdiction under Sections 1343 and 1331, Title 28 U.S.C. Each plaintiff asserts that the termination of his employment constituted a violation of Section 1983, Title 42 U.S.C.

The complaint alleges as to each plaintiff that by reason of various provisions in the Academic Tenure Regulations of the University which constituted a part of his contract of employment he became entitled to tenure or continuous employment and to a promotion. It is alleged that by failing to renew his

contract and to promote him (and at the very least give him timely notice of non-retention), the defendants (various officials and members of the Board of Curators of the University) breached the contract of employment of each plaintiff and denied him substantive and due process of law. The relief prayed for as to each plaintiff is that defendants be ordered to reinstate him as a teacher with all pay to which he is entitled and that he be also awarded compensatory and exemplary damages by reason of the wrongful acts of defendants.

Insofar as plaintiffs rely on alleged breaches of contract (and that is the substance of their respective claims), no federal question is involved. Whether the Academic Tenure Regulations constituted part of the respective contracts of the plaintiffs, and if so whether by reason thereof each plaintiff had tenure thereby under the facts are matters of construction of state law and contract. As Mr. Chief Justice Burger stated, concurring in *Perry v. Sinderman*, — U.S. —, "The relationship between a state institution and one of its teachers is essentially a matter of state concern and state law."

A breach of contract is not converted into a civil rights action merely because a teacher is a party to the contract. Admittedly, there is no diversity of citizenship. Hence, the basic relief sought by plaintiffs is peculiarly for the state courts to award if plaintiffs are entitled thereto.

The complaint as to each plaintiff alleges a violation of the constitutional guarantee of procedural due process, in that neither plaintiff was given a statement of the reason for his non-retention nor a fair and impartial hearing with respect thereto. The resolution of these claims are necessarily dependent upon the determination of the contract claim. See *Perry v. Sinderman*, supra, and *State Board of Regents v. Roth*, — U.S. —.

Although the complaint makes no reference thereto, it is not disputed that after the Tenure Committee of the University had

heard and considered the respective cases of plaintiffs and submitted a majority and minority report with respect thereto, both plaintiffs appealed their non-retention to the Board of Curators (over a month before this suit was filed) and that said appeals were referred by the President of the Board to its Academic Affairs Committee. Thereafter, both plaintiffs through their attorney requested an opportunity to appear before the Committee and present oral arguments by themselves and by their counsel and such opportunity was afforded them, although for various reasons, one of which was related to the convenience of their counsel, the requested hearing has not yet been held. It is now scheduled for October 12, 1972. In this situation, and particularly absent a definitive determination of the state law questions, we believe that the procedural due process claim is premature.

Accordingly, It Is Hereby Ordered that the motions to dismiss for lack of jurisdiction be and they are hereby sustained and this cause is ordered dismissed without prejudice. The foregoing disposition makes it unnecessary to definitively rule on the motions to sever claims and drop parties.

Dated this 4th day of October, 1972.

/s/ JOHN C. REGAN
United States District Judge

APPENDIX G

In the United States District Court
Eastern District of Missouri
Eastern Division

Joseph Victor Cusumano and Sidney M. Harmon,
Plaintiffs,
vs.
C. Brice Ratchford, et al.,
Defendants.
No. 72 C 388 (2).

ORDER

On October 4, 1972, we entered an order dismissing this cause without prejudice for lack of jurisdiction. As the case then stood, each plaintiff had separately pleaded his independent claim for breach of contract but nevertheless improperly joined them together in one action.

We noted in our order that state law was determinative of plaintiffs' respective claims on the merits, and that the proper forum for making such determination was the state courts. The only basis upon which our jurisdiction was invoked was the claim separately made as to each plaintiff that said plaintiff had not been accorded procedural due process with respect to an opportunity to be heard at a hearing, a claim which we held to be premature in that the right to a hearing had in fact been granted to plaintiffs and that such hearing was to be held at a date specified subsequent to the date of our order.

Plaintiffs have now filed a motion for leave to file an amended complaint but without tendering one, so that we are not advised

as to the content of the proposed pleading. We have no more than the statement in the motion that the hearing to which we made reference was held on October 13, 1972, and that decisions adverse to plaintiffs had been made following said hearing. The thrust of the present motion is that by reason of the foregoing facts, the procedural due process claims are no longer premature.

Inasmuch as the amended complaint which plaintiffs propose to file is not before us, we have difficulty understanding plaintiffs' present theory. In *Perry v. Sinderman*, 408 U.S. 593, the Supreme Court held that proof by plaintiff of entitlement to continued employment in light of the policy and practices of the college "would obligate college officials to grant a hearing at his request where he could be informed of the grounds of his non-retention and challenge their sufficiency." Assuming that such a hearing was held on October 13, as we must in the present state of the record, the procedural due process claims would now appear to be not only premature but no longer existent, so that all that remains are the contract claims as to which there are no grounds of federal jurisdiction.

We again call attention to Mr. Chief Justice Burger's concurring opinion in *Perry*, applicable also to *Board of Regents v. Roth*, 408 U.S. 564, underscoring a central point in both decisions, namely "that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law," further stating that "(i)f relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether (a particular teacher) is constitutionaly entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law."

It is evident to us that the present is a question in which the relevant state contract law is unclear, so that abstention and a state court determination would be mandated in any event.

Hence, if plaintiffs are desirous of obtaining a speedy determination of their respective claims they would be well advised to resort to the state courts, particularly as to questions arising under state law. We also note that plaintiffs appear to still be determined to continue their pursuit of separate and independent claims in this one action, so that if leave were given to file another joint complaint it would become necessary either to sever the claims or to drop the claim of one of the parties plaintiff.

Hence, in view of all of the circumstances, since plaintiffs had no procedural due process claims at the time they filed this action or even at the time our ruling was made (without which claims we would have no jurisdiction), we decline to grant leave to plaintiffs to jointly assert their separate claims which came into existence for the first time, if at all, after the action was dismissed, particularly absent a proffered pleading which would suffice for jurisdictional purposes.

Accordingly, plaintiffs' motion for leave to file an amended complaint, is hereby Overruled.

Dated this 15th day of November, 1972.

/s/ JOHN C. REGAN
United States District Judge

APPENDIX H

ACADEMIC TENURE REGULATIONS
UNIVERSITY OF MISSOURI

Established March 10, 1950
by the
Board of Curators
Columbia, Missouri

Academic Tenure Regulations
University of Missouri

The Board of Curators of the University of Missouri[1] hereby affirms its belief in sound principles of academic freedom and academic tenure, adopts the statement of principles concerning academic freedom and academic tenure as set forth in the Appendix, and adopts the following regulations concerning academic staff positions, appointments, tenure and removals.

Sec. 1. *Classes of academic staff positions.*

Academic staff positions are those where the principal services performed by the holders thereof are teaching, or independent research, or both.

A. *Regular*. There shall be four classes of regular academic staff positions: Professor, Associate Professor, Assistant Professor, and Instructor.

B. *Non-regular*. All other academic staff positions shall be considered non-regular.

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[1] Hereinafter the Board of Curators of the University of Missouri is referred to as the Board.

(1) The positions of Visiting Professor, Lecturer, and others of like nature shall be considered special and temporary, and are non-regular.

(2) The positions of Assistant Instructors, Research Associates, Graduate Assistants, Research Assistants, Student Assistants, and others of like nature shall be considered temporary, and non-regular.

(3) Summer Session positions shall be considered non-regular, whatever the titles thereof may be.

(4) Part-time positions ordinarily shall be considered non-regular, whatever the title thereof may be.

(5) The positions of Federal or State employees or appointees attached or assigned to the University, and others of like nature, shall be considered non-regular, whatever the title thereof may be.[2]

(6) The positions of coaches of intercollegiate athletics, whether full- or part-time, shall be considered non-regular, whatever the titles thereof may be.[3]

(7) Appointment made in connection with a special department, program, or institute of an experimental or temporary character may be terminated when the project is discontinued. All such positions shall be considered non-regular, whatever the titles thereof may be.

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[2] For example, the appointments of Colonel Blank, USA, as Professor of Military Science and Tactics, and of Dr. Blank Agronomist, USDA, as Professor of Agronomy, are appointments to non-regular positions.

[3] For example, the appointment of Mr. Blank as Assistant Football Coach and Instructor in Physical Education is an appointment to a non-regular position.

(8) The paragraphs above covering certain types of non-regular positions are illustrative only, and do not purport to constitute a complete listing of non-regular positions.

(9) No number of reappointments to any non-regular position shall create any presumption of a right to reappoint on term or continuous basis.

C. *Administrative positions.* The administrative functions, titles, and status of the president, the vice-presidents, the deans, associate deans and assistant deans of colleges or schools, directors, department chairmen, and other administrators of academic services, shall be distinct and severable from their functions, titles, and status, if any, as academic staff members.

Sec. 2. *Types of appointments.*

A. There shall be two types of appointments to academic staff positions, term appointments and continuous appointments.

B. Term appointments begin at a specific date and terminate at a specified date. Term appointments usually are for a period of one academic year, but may be for a longer or shorter period.

C. Continuous appointments begin at a specified date but have no specified date of termination.

D. Appointments to regular academic staff positions may be either term appointments or continuous appointments, subject to the limitations stated in Sections 4 and 5 as to the maximum number of years of service under term appointments.

E. Appointments to non-regular academic staff positions normally are term appointments. In exceptional individual cases, however, continuous appointments may be made to non-regular academic staff positions. Also, in special types of non-regular academic staff positions under the jurisdiction of the Dean of

the College of Agriculture, the Directors of the Experiment Stations, or the Vice-President in Charge of Extra-Divisional Educational Activities, continuous appointments may be made.

Sec. 3. *Tenure.*

A. Holders of academic staff positions under continuous appointments shall have permanent or continuous tenure, subject to termination only for cause, for retirement for age in accordance with Board retirement regulations, or under extraordinary circumstances because of financial exigencies. Due consideration shall be given to seniority in terms of academic rank and length of service in the event certain continuous appointments must be terminated because of financial exigencies.

B. Holders of academic staff positions under term appointments shall have no rights of permanent or continuous tenure. Their appointments shall not be terminated during the term thereof except for cause, or under extraordinary circumstances because of financial exigencies.

C. No person shall lose any tenure rights acquired if he is granted a leave of absence, if he is promoted, or if he accepts appointment to a non-regular academic staff position or to an administrative position, unless the appointment is subject to the express condition that he release or waive any such tenure rights.

D. The removal of any person from an administrative position shall not impair his tenure rights, if any, as an academic staff member.

Sec. 4. *Appointments of persons without experience to regular academic staff positions.*

The following provisions apply to an appointment to regular academic staff position of a person who has not previously held

a full-time regular or non-regular academic staff position at the rank of Instructor or higher at this University, or a comparable position elsewhere.

A. *Instructor.* Initial appointment at the rank of Instructor shall be a term appointment for one academic year. The maximum probationary period on term appointments shall not exceed seven years. During the appointee's initial one year term, and during each succeeding term through his seventh year of service, his dean or other apropriate administrative officer shall make one of the following recommendations, except that recommendations (1) and (2) shall not be made during the appointee's seventh year of service:

(1) that he be reappointed Instructor for a term;

(2) that he be promoted to Assistant Professor on term appointment. If such recommendation is effected by Board action, Section 4 B controls thereafter, except that the maximum probationary period on term appointments shall not exceed seven years, and all of the service as an Instructor shall be credited toward said seven year period;

(3) that he be promoted to Assistant Professor on continuous appointment;

(4) in exceptional individual cases, that he be reappointed Instructor on continuous appointment;

(5) in special types of positions under the jurisdiction of the Dean of the College of Agriculture, the Dean of the College of Education, the Directors of Experiment Stations, or the Vice-President in Charge of Extra-Divisional Educational Activities, that he be reappointed Instructor on continuous appointment;

(6) that he be reappointed Instructor for a terminal one year term, expressly stated to be such; or

(7) that he not be reappointed, provided there has been timely notice as stipulated in Section 4 E. A formal recommendation to this effect need not be made.

B. *Assistant Professor.* Initial appointment at the rank of Assistant Professor normally shall be a term appointment for one year, but in exceptional cases may be for a longer term. The maximum probationary period on term appointments shall not exceed six years. During the appointee's initial term, and during each succeeding term through his sixth year of service, his dean or other appropriate administrative officer shall make one of the following recommendations, except that recommendation (1) shall not be made during the appointee's sixth year of service:

(1) that he be reappointed Assistant Professor for a term;

(2) that he be reappointed Assistant Professor on continuous appointment;

(3) that he be promoted to Associate Professor on continuous appointment;

(4) that he be reappointed Assistant Professor for a terminal one year term, expressly stated to be such; or

(5) that he not be reappointed, provided there has been timely notice as stipulated in Section 4 E. A formal recommendation to this effect need not be made.

C. *Associate Professor.* Initial appointment at the rank of Associate Professor normally shall be at term appointment. The maximum probationary period on term appointments shall not exceed four years. During the appointee's initial term, and during each succeeding term through his fourth year of service, his dean or other appropriate administrative officer shall make one of the following recommendations, except that recommendation

(1) shall not be made during the appointee's fourth year of service:

(1) that he be reappointed Associate Professor for a term;

(2) that he be reappointed Associate Professor on continuous appointment;

(3) that he be promoted to Professor on continuous appointment;

(4) that he be reappointed Associate Professor for a terminal one year term, expressly stated to be such; or

(5) that he not be reappointed, provided there has been timely notice as stipulated in Section 4 E. A formal recommendation to this effect need not be made.

D. *Professor.* Initial appointment at the rank of Professor normally shall be a term appointment. The maximum probationary period on term appointments shall not exceed three years. During the appointee's initial term, and during each succeeding term through his third year of service, his dean or other appropriate administrative officer shall make one of the following recommendations, except that recommendation (1) shall not be made during the appointee's third year of service.

(1) that he be reappointed Professor for a term;

(2) that he be reappointed Professor on continuous appointment;

(3) that he be reappointed Professor for a terminal one year term, expressly stated to be such; or

(4) that he not be reappointed, provided there has been timely notice as stipulated in Section 4 E. A formal recommendation to this effect need not be made.

E. *Notice that reappointment will not be recommended.* An appointee who is not to be recommended for reappointment at the end of any term of appointment shall be notified in writing to that effect by his dean or other appropriate administrative officer. Notice of not less than one year shall be given to the following persons: (1) an Instructor who has completed at least three years of service; (2) an Assistant Professor who has completed at least two years of service; and (3) an Associate Professor or Professor who has completed his initial term appointment. In all other cases notice of not less than six months shall be given, i.e., in the usual case of a term appointment for the regular academic year, the notice shall be given prior to March 1.

A terminal one year appointment expressly stated to be such shall be sufficient notice that the appointee will not be recommended for reappointment at the end of the terminal period.

Where the period of total service at the rank of Instructor is limited by division or department rules, the statement of that limitation in the initial appointment shall be sufficient notice that the appointee will not be recommended for reappointment at the end of the limited period, and no further notice shall be necessary.

F. *Statement of reasons for not recommending reappointment.* The non-reappointment of any appointee on term appointment shall carry no implication that either his work or his conduct has been unsatisfactory. For this reason it shall not be necessary for his dean or department chairman to provide him with any statement of causes or reasons for not recommending reappointment.[4]

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[4] Where appropriate to the context, the term "deans" shall include the Vice-President in Charge of Extra-Divisional Educational Activities and Directors of Experiment Stations. The term "department chairmen" shall include the administrative personnel directly responsible to said Vice-President.

G. Term reappointments shall be made for one year only if a term appointment for a longer term would extend the total period of service on term appointments beyond the maximum periods specified above.

H. Where a term appointment for one full year would extend into the next academic year, normally a term appointment for the balance of the current academic year shall be made.

Sec. 5. *Appointments of persons with previous experience to regular academic staff positions.*

The following provisions apply to a new appointment to a regular academic staff position of a person who has previously held a full-time regular or non-regular academic staff position at the rank of Instructor or higher at this University, or a comparable position elsewhere.

A. *Instructor*. The provisions of Section 4 A control, except that all of the previous service not in excess of three years shall be credited toward the seven year maximum probationary period on term appointments.

B. *Assistant Professor*. The provisions of Section 4 B control, except that all of the previous service not in excess of two years shall be credited toward the six year maximum probationary period on term appointments.

C. *Associate Professor*. The provisions of Section 4C control, except that all of the previous service not in excess of one year shall be credited toward the maximum four year probationary period on term appointments. If the appointee has had a substantial period of previous service, the decision whether to recommend continuous appointment normally shall be made during the initial term. In exceptional cases, the initial appointment may be a continuous appointment.

D. *Professor*. The provisions of Section 4 D control, except that all of the previous service not in excess of one year shall be credited toward the maximum three year probationary period on term appointments. If the appointee has had a substantial period of previous service, the decision whether to recommend continuous appointment normally shall be made during the initial term. In exceptional cases, the initial appointment may be a continuous appointment.

Sec. 6. *Completion of graduate studies by regular academic staff members.*

A. Academic staff members, on term appointment to regular positions, who are pursuing graduate studies either at this University or elsewhere shall be expected to make normal progress toward their degrees or other objectives. This regulation shall be sufficient notice to such appointees concerning the limitations on the maximum period of service on term appointments. Any such appointee who, at the beginning of his last year on term appointment at his attained rank, foresees that he will not be able to complete his work for a graduate degree during that year, may petition the dean of his college or school for reemployment beyond that year to enable him to complete his graduate studies. The dean of the college or school concerned may, at his discretion, recommend for such appointee a term appointment. Such position shall be considered non-regular, whatever the title thereof may be. There shall be not more than three such extensions of employment, and the total extension shall in no case exceed three academic years. In no case shall any such extensions to permit completion of graduate studies be construed to create any right thereafter to appointment to a regular academic staff position.

B. Except as stated above, an appointee to a regular academic staff position who has completed his maximum period of service

under term appointments shall not be appointed to a non-regular position involving substantially the same duties.

Sec. 7. *Notice of appointment.*

The Secretary of the Board shall notify appointees to the academic staff of the action of the Board in making the appointment. Such notice shall include the following information:

(1) whether the position is regular or non-regular;

(2) whether the appointment is for a term or is continuous;

(3) if the appointment is a terminal appointment, a statement to that effect; and

(4) if the appointment is made to a position in a special department, program, or institute, a statement to the effect that the project is of a contingent, experimental, and probably temporary nature, and that the appointee may or may not be appointed to another position if the project is discontinued.

The notice also shall specifically refer to and incorporate by reference these Regulations, a copy of which shall be enclosed with the notices. The section of the notice relating to acceptance of the appointment shall contain an acknowledgment by the appointee that he has received and has read a copy of these Regulations.

Sec. 8. *Committees on Tenure.*

A. *University Faculty Committee on Tenure.* There is hereby created a University Faculty Committee on Tenure. This Committee shall be composed of members of the regular academic staff, one from each of the faculties of the College of Arts and Science, the School of Business and Public Administration, the College of Education, the College of Engineering, the School of Journalism, the School of Law, the School of Medicine, and

the School of Mines and Metallurgy, and two from the Division of Agricultural Sciences, one to represent the College of Agriculture and one to represent the School of Veterinary Medicine. Each such faculty shall, at a regular meeting during the second semester in each academic year, elect one of its members to membership on the Committee to serve for the following academic year, and also elect an alternate member, who shall serve in the event the regular Committee member is unable to serve. Members shall be elected from the eligible Professors of the respective faculties; if there be only one eligible Professor, he shall be a member, and the alternate member shall be elected from among the eligible Associate Professors.

Only persons on continuous appointment are eligible for membership on the Committee. Deans, associate or assistant deans, and other persons who devote a substantial portion of their time to administrative duties, shall not be eligible to membership on the Committee.

The President shall appoint from among the elected Committee members a chairman pro tempore, who shall call the first Committee meeting, at which time the Committee shall elect from among its members a Chairman and Secretary to serve at the pleasure of the Committee.

B. *Missouri School of Mines and Metallurgy Divisional Faculty Committee on Tenure.* There is hereby created a Divisional Faculty Committee on Tenure at the Missouri School of Mines and Metallurgy. This Committee shall be composed of members of the regular academic staff, one from each of the academic departments.

Each department faculty shall, during the second semester of each academic year, elect one of its members to membership on the Committee to serve for the following academic year,

and also elect an alternate member, who shall serve in the event the regular Committee member is unable to serve. Members shall be elected from the eligible Professors of the respective departmental faculties; if there be only one eligible Professor, he shall be the member and the alternate member shall be elected from among the eligible Associate Professors.

Only persons on continuous appointment are eligible for membership on the Committee. Deans, associate or assistant deans, and other persons who devote a substantial portion of their time to administrative duties, shall not be eligible to membership on the Committee.

The Dean of the Missouri School of Mines and Metallurgy shall appoint from among the elected Committee members a chairman pro tempore who shall call the first Committee meeting at which time the Committee shall elect from among its members a Chairman and Secretary to serve at the pleasure of the Committee. This Committee may act independently on problems originating at the Missouri School of Mines and Metallurgy. The Committee may, at its discretion, refer cases to the University Committee.

The member elected by the Faculty of the Missouri School of Mines and Metallurgy to the University Faculty Committee on Tenure shall be selected from members of the Divisional Faculty Committee on Tenure.

Sec. 9. *Removals for cause.*

All persons appointed to positions on the academic staff shall be subject to removal for cause, i.e., continuous appointments may be terminated for cause, and term appointments may be terminated prior to the end of the term thereof for cause. The causes for removal shall be only such as seriously interfere with the appointee's capacity to perform his duties competently or with his usefulness to the University. No ap-

pointee shall be removed from any position on the academic staff in violation of the principles of academic freedom adopted by the Board in the Preamble of these Regulations and set forth in the Appendix.

Sec. 10. *Procedure in removal cases.*

In any case where removal for cause is recommended by a dean or other appropriate administrative officer, the person affected shall be notified in writing by such officer of the decision to recommend removal and the reasons therefor. The President or, in his absence, the dean of the division, may at the same time immediately suspend the appointee from part or all of his assigned duties, and in appropriate cases assign him temporarily to other duties. If the person to be recommended for removal so desires, he may request and shall be accorded an investigation of the facts by the appropriate Committee on Tenure. Failure to make such a request in writing to the President and the appropriate Committee within thirty days from the time of such notice, shall constitute a waiver of his right to a hearing before the Committee.

If the appointee does request such an investigation, the appropriate Committee on Tenure shall, with due expedition considering the interests of both the University and the person affected, make its investigation and report its findings and recommendations to the President. The provisions of the Appendix, Academic Tenure, par. (a) (4) shall be followed by the Committee on Tenure. Before removal takes place, the person affected may, if he so desires and requests in writing, appeal to the President of the Board for a hearing before the Board.

Sec. 11. *Hearings in other cases.*

Any member of the academic staff who disputes the ruling of any administrative officer with respect to the facts con-

cerning his tenure rights and status shall have a right to a hearing thereon before the appropriate Committee on Tenure. The Committee shall hear such cases with due expedition considering the interests of both the University and the person affected, and shall make a report of its findings and recommendations to the President.

Sec. 12. *Provisions relating to present members of the academic staff.*

A. *No impairment of rights of tenure.* Nothing contained in these Regulations shall be deemed to impair any rights of tenure, expressed or implied, whatever they may be, of a member of the academic staff now on appointment to a regular or non-regular position, or to abrogate any mutual understandings with respect to the tenure of any such appointee in effect at the time that these Regulations are adopted, provided that such rights were created, or mutual understanding entered into, by the Board or by a duly authorized agent thereof.

B. *Persons now on continuous appointment.* Present members of the academic staff on continuous appointment have acquired permanent or continuous tenure heretofore, and such status is hereby confirmed.

C. *Persons now on term appointment to regular academic staff positions.*

(1) *Less than the maximum probationary period of service.* An academic staff member holding a regular position on term appointment who at the end of the 1950-51 academic year shall have completed at this University less than maximum probationary periods of service on term appointments, viz., seven years for an Instructor, six years for an Assistant Professor, four years for an Associate Professor, and three years for a Professor, shall be governed by the provisions of Section 4.

(2) *More than seven years of service.* An academic staff member holding a regular position on term appointment who at the end of the 1950-51 academic year shall have held for more than seven years a full-time regular position at the rank of Instructor or higher at this University shall be deemed to have acquired permanent or continuous tenure at his attained rank; provided however, that there was no agreement or understanding, expressed or implied, that either completion of graduate studies or further professional training was a condition to continued employment. Cases where such an agreement or understanding exists shall be governed by Section 6 above providing for not more than three additional years on term appointment in order to permit the completion of such studies or training, or by Section 12 C (3) below providing for either a continuous appointment or a terminal one year appointment.

(3) *Other cases.*

(a) *Instructors.* In the case of an academic staff member holding a regular position on term appointment at the rank of Instructor who at the end of the 1950-51 academic year shall have completed at this University exactly seven years of service, his dean or other appropriate administrative officer shall make one of the following recommendations:

(i) that he be promoted to Assistant Professor on continuous appointment;

(ii) in exceptional individual cases, that he be reappointed Instructor on continuous appointment;

(iii) in special types of positions under the jurisdiction of the Dean of the College of Agriculture, the Dean of the College of Education, the Directors of Experiment Stations, or the Vice-President in Charge of Extra-Divisional Educational Activities, that he be reappointed Instructor on continuous appointment; or

(iv) that he be reappointed Instructor for a terminal one year term, expressly stated to be such.

(b) *Assistant Professors, Associate Professors and Professors.* In the case of an academic staff member above the rank of Instructor holding a regular position on term appointment who at the end of the 1950-51 academic year shall have completed at this University exactly seven years of service, or shall have completed at this University at least the maximum probationary periods of service specified in Section 12 C (1) but shall have completed less than seven years of service (i.e., an Assistant Professor with at least six years but not more than seven years of service, an Associate Professor with at least four years but not more than seven years of service, and a Professor with at least three years but not more than seven years of service), his dean or other appropriate administrative officer shall make one of the following recommendations:

(i) that he be reappointed at his attained rank on continuous appointment;

(ii) that he be promoted to the next higher rank on continuous appointment; or

(iii) that he be reappointed at his attained rank for a terminal one year term, expressly stated to be such.

D. The deans of the several colleges and schools, after consultation with department chairmen and with the individual staff members concerned, shall not later than December 1, 1950, present to the President full information in writing as to the status of all members of the academic staff under their respective jurisdictions. Such information shall show what members of the academic staff hold regular positions and what ones hold non-regular positions, and what members of the academic staff already have acquired permanent tenure and what ones have not, and as to the latter shall show what credit in terms of years of

service at this University they have acquired toward the maximum probationary periods on term appointments.

E. It shall be the duty of each academic staff member to assist his administrative officers in compiling the necessary information as to his status. The dean shall furnish each academic staff member with a copy of the report he intends to make to the President concerning the appointee's status. Any academic staff member who claims by prior agreement, understanding, or otherwise, greater rights with respect to tenure than are reported by the dean to the President, may file a written detailed statement of his claim and ask for a review of the facts by the appropriate Committee on Tenure; copies of the statement shall be filed with his department chairman, if any, with his dean, and with the President. Failure to file such a statement within thirty days after notification of the findings of the dean shall be considered a waiver of any special rights that he might otherwise have claimed, and as an acceptance of the dean's findings in his case.

F. Upon receiving from each dean the roster of the academic staff of his college or school, together with the requisite information concerning the status of each member thereof and the dean's findings thereon, together with any recommendations as to changes in appointments in order to comply with Section 12 C, the President shall review the information, findings, and recommendations with the dean, make any decisions that may be necessary, and then lay before the Board the roster, together with the necessary information and findings, with his recommendations. Approval by the Board shall have the effect of establishing definitely the status of each member of the faculty covered by the Board's action, and thereupon the Secretary of the Board shall notify each academic staff member as to the decision in his case.

Sec. 13. *Years of Service.*

Years of service under Sections 4, 5, and 12 shall be computed in terms of academic years. One semester equals one-half academic year, and one-quarter equals one-third academic year. Not more than one academic year's credit shall be allowed for service during any consecutive twelve month period.

The following periods of service shall be excluded: (1) service under any non-regular appointment involving duties substantially different from duties in a regular position; (2) "service" while on leave of absence, whether sabbatical or otherwise; (3) service under summer term appointments.

Periods of service need not be continuous, but shall be cumulative, except that any period of service for less than one quarter may be disregarded. However, in the case of service which was interrupted during a quarter or semester because the appointee entered the armed forces of the United States, credit for a full quarter or semester shall be allowed. Credit for a full quarter or semester also shall be allowed where a person was relieved from active duty with the armed forces of the United States and within a reasonable time thereafter entered or re-entered academic service, but by reason of the date of the termination of his active military duties he was not able to serve a full quarter or semester.

In allowing credit for previous service, fractions of an academic year may be excluded, where crediting such fraction would require administrative decisions as to recommendations at times other than the normal period during the academic year when such administrative decisions are made.

Sec. 14. *Publication of these Regulations.*

A. These Regulations shall be published in pamphlet form, and each person who now holds a position on the academic staff shall receive a copy thereof. Present academic staff members shall

within a reasonable time after receiving a copy of these Regulations acknowledge in writing receipt thereof.

B. These Regulations, with the exception of Section 12, "Provisions relating to present members of the academic staff," shall be published in pamphlet form, and each person who hereafter is appointed to the academic staff shall receive a copy thereof.

Sec. 15. *Amendments.*

These Regulations shall be subject to amendment by the Board. The President shall transmit proposed amendments, from whatever source, to the University Policy Committee for its consideration, and this Committee shall present its recommendations to the University Faculty for action at a regular or special meeting. The University Policy Committee and the University Faculty together shall have not less than thirty days for the consideration of amendments. The final action of the University Faculty shall be advisory only.

Sec. 16. *Legal effect of these Regulations.*

These Regulations are a statement of policy within the limits of which the Board expects to exercise the powers vested in it, but these Regulations shall not impair, or be taken to waive, any powers nor or hereafter vested in the Board under the Constitution and Laws of this State.

Appendix[5]

1940 Statement of Principles

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher[6] or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically; (1) Freedom of teaching and research and of extra-mural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

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[5] This statement of principles was endorsed by the Association of American Colleges on January 9, 1941, by the American Association of Teachers Colleges on February 22, 1941, by the American Association of University Professors on December 28, 1941, and by the Association of American Law Schools on December 29, 1946.

[6] The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Academic Tenure

(a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice.

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of high education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notices should be given at least one year prior to the expiration of the probationary period, if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an advisor of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own

or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1423

JOSEPH VICTOR CUSUMANO and SIDNEY M. HARMON,
Petitioners,

v.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JACKSON A. WRIGHT
227 University Hall
Columbia, Missouri 65201
Attorney for Respondents

Of Counsel
MARVIN E. WRIGHT
JAMES S. NEWBERRY
RICHARD S. PADEN
227 University Hall
Columbia, Missouri 65201
ROBERT NEILL, JR.
705 Olive Street
St. Louis, Missouri 63101

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Respondents pray the Court to deny the application for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered December 17, 1974.

QUESTIONS PRESENTED

1. Did the Eighth Circuit Court of Appeals err in holding that a teacher is not constitutionally entitled to reasons for his non-reappointment and a hearing in respect thereto where a Univer-

sity has formal, written, published Tenure Regulations and a non-tenured teacher is given a terminal one year contract in complete compliance with the Tenure Regulations and there is no claim of impermissible reasons and no charge against the teacher that might damage his standing and associations in his community and there is not imposed upon him any stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities?

2. Is the opinion of the Eighth Circuit Court of Appeals in this matter in conflict with other Circuit Court of Appeals decisions or in conflict with applicable decisions of the United States Supreme Court?

STATEMENT OF THE CASE

Lest there be confusion arising from the reference in Petitioners' Statement of the Case to a dismissal on the fourth day of October, 1972 (Page 6 of Petition for Writ), the Respondents will set forth a chronological description of the events in this matter.

On June 22, 1972, the Petitioners instituted an action in the United States District Court for the Eastern District of Missouri. This action bore Docket Number 72 C388(2). This action culminated in a dismissal without prejudice by the Honorable John C. Regan, District Judge. The Orders involved took place on October 4, 1972 and November 15, 1972. Judge Regan's Orders concerning the first case in this matter are set forth on pages A-28 through A-33 of the Petition for Writ.

A year later on October 3, 1973, Petitioners instituted another action in the United States District Court for the Eastern District of Missouri. This action bore Docket Number 73 C668(1) with the case being assigned to Honorable James H. Meredith,

District Judge. Thereafter on November 20, 1973, Petitioners were granted leave to file an Amended Complaint. This case resulted in a dismissal with prejudice by Judge Meredith. Judge Meredith's Order and Memorandum are set forth on pages A-1 through A-8 of the Petition for Writ. This last case is the one that was appealed to the Eighth Circuit Court of Appeals and the judgment rendered by the Eighth Circuit Court of Appeals is the subject of the present Petition before this Court for Writ of Certiorari.

It should also be noted that although the Petitioners are presenting their Petition for Writ of Certiorari pro se that they were represented by counsel in the proceedings up through the appeal to the Eighth Circuit Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT

Respondents do not believe this to be a case justifying the granting of a writ of certiorari to the Supreme Court of the United States.

1. It is an established fact that since March 10, 1950 the University of Missouri has had formal, written, published Academic Tenure Regulations (See Exhibit "A" Addendum to Appendix C.A.8 and pages A-34 through A-57 of the Petition for Writ). It is equally clear that the terminal one year contracts issued to Petitioners completely complied with the Tenure Regulations. (See pages A-5 through A-7, A-15 through A-17, and A-38 through A-39 of the Petition for Writ). It is patent on the face of Petitioners' Amended Complaint that there are no allegations of impermissible reasons such as abridgement of freedom of speech or discrimination on the part of the University. (See pages 5 through 9 and 12 through 16 of the Appendix C.A.8). It is obvious that the University made no charges against either of the Petitioners that might damage his standing and associations in his community or impose upon him any stigma or other disability that would foreclose his freedom to take advantage of other employment opportunities. This is obvious because the Petitioners' present frustrations arise from the lawful refusal of the University to give any reasons for the University's actions in issuing terminal one year contracts to the Petitioners. It is further obvious that no incriminating charges have been made against the Petitioners as the portion of the Tenure Regulations, Section 4F, that cover the rationale for not giving reasons for non-reappointment clearly states as follows. "The non-reappointment of any appointee on term appointment shall carry no implication that either his work or his conduct has been unsatisfactory. For this reason it shall not be necessary for his dean or department chairman to provide him with any statement of causes or reasons for not recommending reappointment." (See page A-41 of Petition for Writ).

The recital of the foregoing undisputed circumstances in the instant case clearly shows the decisions of the District Court and the Eighth Circuit Court of Appeals were made, and properly so, upon the decision of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed.2d 548, 92 S. Ct. 2701, since the Roth decision is factually and legally directly in point with the instant case.

2. The second question set forth in the Respondents' Brief relates to conflicts in opinions of the various Circuit Court of Appeals and the possible conflict with an applicable opinion of the Supreme Court.

A. The Petitioners, to support their assertion that a conflict exists between the decision in the instant case by the Eighth Circuit Court of Appeals and other Circuit Court of Appeals, cite the following cases: *Drown v. Portsmouth School District*, 435 F.2d 1182 (1st Cir. 1970) Cert. Denied, 402 U.S. 972; *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970); *Francis v. Ota*, 356 F. Supp. 1029 (D.C.D. Hawaii, 1973); *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969); and *Pred v. Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851 (5th Cir. 1969).

The simple answer to the inapplicability of the foregoing decision of various Circuit Courts of Appeal is the fact that they were all decided prior to June 29, 1972. The prior conflicts in the opinions of the various Circuit Courts of Appeals relating to employment relationships between teachers and schools were thankfully laid to rest with the decisions by this Court in *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S. Ct. 2694 and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S. Ct. 2701, which were decided June 29, 1972. The only case cited by Petitioners that was decided after *Sinderman*, supra, and *Roth*, supra, is the case of *Francis v. Ota*, supra, which is a decision of the United States District Court of

Hawaii. An opinion of a District Court is inappropriate authority to claim that a conflict exists between different Circuit Courts of Appeals on a given subject which must be shown under Rule 19(b) of the Supreme Court Rules.

B. Another ground to substantiate a review on certiorari under Rule 19 of the Supreme Court Rules is when a decision of a Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of the Supreme Court. The Petitioners asserted that the Eighth Circuit Court of Appeals erred in distinguishing the case of *Perry v. Sindermann*, supra. (See page 3 of Petition for Writ). This is an apparent reference to that portion of the opinion of the Eighth Circuit Court of Appeals found on page A-18 of the Petition for Writ wherein the Court noted that "The entire thrust of the Tenure Regulations is to avoid the 'de facto' tenure hypothesized in *Sinderman*, supra, 408 U.S. at 602." The Court then quotes from Section 3B of the Tenure Regulations which states that, "Holders of academic staff positions under term appointments shall have no rights of permanent or continuous tenure." Of equal effect would be Section 12 of the Tenure Regulations (See page A-48 through A-51 of Petition for Writ) which required anyone claiming existing implied tenure rights at the time of the adoption of the Regulations to prove them up or be forever barred from making such claims and anyone not then having tenure would thereafter be governed by the provisions of Section 4 of the Tenure Regulations.

The distinguishing of *Perry v. Sindermann*, supra, by the Eighth Circuit was completely proper because as was pointed out in point 1 above, the instant case is controlled by the decision in *Roth*, supra, thus the Eighth Circuit made the same distinction as made by this Court when it decided *Sindermann*, supra, and *Roth*, supra.

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

JACKSON A. WRIGHT
227 University Hall
Columbia, Missouri 65201
Attorney for Respondents

Of Counsel

MARVIN E. WRIGHT
JAMES S. NEWBERRY
RICHARD S. PADEN
227 University Hall
Columbia, Missouri 65201

ROBERT NEILL, JR.
705 Olive Street
St. Louis, Missouri 63101

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1423

JOSEPH VICTOR CUSUMANO and
SIDNEY M. HARMON,
Petitioners,

vs.

DR. C. BRICE RATCHFORD, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

In Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SIDNEY M. HARMON
Vida, Missouri 65581
JOSEPH VICTOR CUSUMANO
Rt. 1, Box 43 F
Portage des Sioux, Missouri 63373
Petitioners in Pro Se

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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ARGUMENT

I. The Circuit Court Relied Totally on Particular Provisions of the Tenure Regulations Which Are Inapplicable to Your Petitioners.

The respondents, in their opposition brief (Pages 4 and 6 wherein Section 3B of the Tenure Regulations is quoted), have shown the reliance of the Circuit Court on provisions of the

Tenure Regulations, A-34 through A-57 of the Petition for Writ (hereinafter "the Regulations") which apply exclusively to probationary teachers (teachers on term appointments before the expiration of their maximum probationary periods). The particular provisions which the Circuit Court relied on clearly do not apply to teachers, such as your petitioners, who have completed their maximum probationary periods and were thereafter reappointed. This inapplicability is demonstrated by the Regulations which allow term appointments only before the expiration of the maximum probationary period, and recognize only tenured appointments after the end of such probationary period (Sections 2D, 2A and 3A, pages 4, A-36 and A-37 of the Petition for Writ).

In the instant case, there is no dispute that your petitioners began their final probationary year without notification by the respondents that their employment would be terminated. Because there was no such notification at that time, the Regulations mandated that your petitioners be reappointed after they completed their maximum probationary periods (Section 4E, page A-41, Petition for Writ). As shown above, the Regulations require that such reappointments after the maximum probationary period must be tenured. Respondents' adoption in their Regulations of the "Statement of Principles" and their past practice (Pages 6, 9 and 11 of the Petition for Writ) also require that tenured reappointments follow the completion of the maximum probationary period.

The Regulations clearly classify the terminal one year term appointments, which the respondents issued to the petitioners, as term appointments (Sections 2A, 2B and 2C, pages 4 and A-36 of the Petition for Writ). Also, it is undisputed that these terminal term appointments began after the petitioners completed their maximum probationary periods. Therefore, such a term reappointment expresses a termination of employment and not merely a one-year reappointment which was

impermissible under Regulations recognizing only tenured reappointments following the maximum probationary period.

Neither respondents in their opposition brief, nor the Circuit Court in its opinion, have noted those provisions of the Regulations which prohibit the recommendation of a term appointment during the final probationary year (Sections 4A and 4C, pages A-38 and A-39 of the Petition for Writ). Thus the assertion, that "during any year of a term appointee's probationary period, he [probationary teacher] may be subject to what amounts to a notification of discharge . . . [without due process]" found at page A-18 of the Petition for Writ and at 507 F.2d 980, 984 (1974), selectively ignores the pertinent prohibitions stated above. By denying the petitioners their day in court, in which they can present evidence showing that the policy and practice of the University required a tenure appointment after the maximum probationary period, the decision of the Circuit Court gives petitioners no opportunity to prove their "property interest" as expressed in *Sindermann, infra.*

The respondents in their opposition brief at page 6 also cite Section 12 of the Regulations. This section (A-48 through A-51 of the Petition for Writ) deals only with members of the academic staff at the time of the adoption of the Regulations on March 10, 1950. This section is inapplicable to your petitioners because they were initially appointed many years after such adoption.

II. The Court of Appeals Erred in Distinguishing the Case of Perry v. Sindermann, 408 U.S. 593 (1972), and in Not Bringing Its Decision in Harmony With Decisions From Other Circuits.

Respondents have posited in their brief at page 5 that petitioners have cited cases which have been superseded by decisions

of the Supreme Court. In answer to this assertion, petitioners state that those cases which petitioners cited in their brief have not been superseded by Supreme Court decisions but have, in effect, reinforced the decisions of the Supreme Court, as evidenced by restatements of positions of various circuits, following the decisions in *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L. Ed.2d 548, 92 S. Ct. 2701. For example, in the case of *Moore v. Knowles*, 482 F.2d 1069 (5th Cir. 1973), the Circuit Court stated, in withdrawing its judgment against plaintiff's claim and in remanding it;

> "In his petition for rehearing, Moore [the teacher] makes two major points. The first is that he is entitled to a remand to afford him the opportunity to offer proof tending to show that while he lacked contractual or formal tenure he nevertheless possessed a 'property' interest in his continued employment as defined by the new *Sindermann* principles. *Sindermann* was decided at the trial level on summary judgment. The Supreme Court remanded the case to afford plaintiff an opportunity to prove his claim of constructive tenure. . . . We agree with plaintiff [the teacher] that he is entitled to his day in court under the new standards laid down by *Sindermann*. We . . . remand the case for further consideration by it [District Court] under the new standards of *Sindermann*." 482 F.2d at 1072.

The Fourth and Fifth Circuits of the Court of Appeals, in cases decided after *Roth, supra* and *Sindermann, supra*, both followed the argument of petitioners in asserting the right of nontenured teachers to claim procedural due process rights against employers under the decision of *Sindermann, supra*. *Johnson v. Fraley*, 470 F.2d 179, 182 (4th Cir. 1972) and *Zimmerer v. Spencer*, 485 F.2d 176, 177 (5th Cir. 1973).

The respondents also quoted from the opinion of the Eighth Circuit Court to the effect that "The entire thrust of the tenure

Regulations is to avoid the *de facto* tenure hypothesized in *Sindermann, supra*." (Page 6 of respondents' brief). The respondents in adopting the language of the Eighth Circuit Court imply that decades of practice and procedures previously followed can be swept under the boards, to the detriment of petitioners, and without recourse. In the opinion of the Eighth Circuit Court, it is suggested that the refusal to give a tenure appointment to petitioners may have been administrative neglect or oversight as to notice of termination (A-22 and A-23 of the Petition for Writ and 507 F.2d 980, 986 (8th Cir. 1974)). Petitioners have from the time of the filing of this suit, offered to prove that the previous practice has been constant at the University in that no notice was given unless a teacher was to be terminated, and that a continuous contract automatically followed the maximum probationary period.

CONCLUSION

For these reasons and those already presented in the Petition for Certiorari, petitioners respectfully submit that the Court should grant certiorari in this case.

Respectfully submitted

SIDNEY M. HARMON
Vida, Missouri 65581
Petitioner in Pro Se

JOSEPH VICTOR CUSUMANO
Route 1, Box 43 F
Portage Des Sioux, Missouri 63373
Petitioner in Pro Se

Certificate of Service

Three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed this 28th day of August, 1975, postage prepaid to Mr. Jackson A. Wright, 227 University Hall, Columbia, Missouri 65201.

Sidney M. Harmon